121-67

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. 322. 77

THE MERCHANTS MUTUAL INSURANCE COMPANY, APPELLANT,

vs.

GEORGE D. ALLEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF LOUISIANA.

FILED OCTOBER 2, 1883.

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1 *Appeal from the District Court of the United States for the Eastern District of Louisiana.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit, Eastern District of Louisiana.

GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INSURANCE CO. } No. 10224.

Transcript of Record of the District Court of the United States for the Eastern District of Louisiana. Filed April 21st, 1883.

GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INSURANCE CO'PY. } No. 11894.

Libel. Filed January 13, 1883.

Eastern District of Louisiana. In Admiralty.

2 GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INSURANCE COMPANY OF NEW ORLEANS. } No. 11894.

To the Hon. Edward C. Billings, judge of the dist. court of the U. S. in & for the east. district of Louisiana:

The libel of complaint of George D. Allen against the Merchants' Mutual Insurance Company of New Orleans, a corporation duly created and existing under and by virtue of the laws of Louisiana, and domiciled and doing business in the eastern district of Louisiana, in a cause of contract, civil and maritime.

And thereupon said libellant doth allege and articulately propound as follows:

3 1st. That on and prior to the 15th day of April, 1882, libellant was the owner of ¼ of the ship Orient, of the burden of 1,833 4/95 tons, American measurement, or thereabouts, and that he remained so the owner of ¼ of said vessel until said vessel was wrecked, lost, and destroyed, as hereinafter set forth.

2d. That the interest and share of libellant in said ship or vessel was, on and prior to the said 15th day of April, 1882, and up to the time of the wreck and destruction of said vessel in the high seas, on the 8th or 9th days of September, 1882, continued to be of a value far exceeding the sum of $5,000.

3. That on the 15th day of April, A. D. 1882, the said Orient was on the high seas, bound to the port of New Orleans, staunch, strong, and in all things well fitted and seaworthy; that on said last-men-

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And thereupon said libellant doth allege and articulately propound as follows:

3 1st. That on and prior to the 15th day of April, 1882, libellant was the owner of ½ of the ship Orient, of the burden of 1,833$\frac{49}{100}$ tons, American measurement, or thereabouts, and that he remained so the owner of ½ of said vessel until said vessel was wrecked, lost, and destroyed, as hereinafter set forth.

2d. That the interest and share of libellant in said ship or vessel was, on and prior to the said 15th day of April, 1882, and up to the time of the wreck and destruction of said vessel in the high seas, on the 8th or 9th days of September, 1882, continued to be of a value far exceeding the sum of $5,000.

3. That on the 15th day of April, A. D. 1882, the said Orient was on the high seas, bound to the port of New Orleans, staunch, strong, and in all things well fitted and seaworthy; that on said last-men-

tioned date this libellant in due —, having made application
4 therefor, applied, through his duly authorized agents, to the said respondent, The Merchants' Mut. Ins. Co. of New Orleans, for an insurance of his said interest and share in said vessel against loss and damage by the perils of the seas, jettisons, fire, pirates, overpowering thieves, and all other losses to which insurers in like cases are liable by their contract of insurance, and the said respondent agreed to insure libellant's interest and share in said vessel to the extent and amount of $5,000, valuing the entire ship at the sum of $25,000, for and in consideration of a premium to be paid by libellant of 10% on said sum of $5,000; that is to say, for the sum of $500, to be paid by libellant as premium and consideration on his part; that both libellant and the respondent agreed to said terms and contract.

4. That having come to the understanding and agree-
5 ment aforesaid, libellant then and there paid to said respondent the sum of $500, less the usual rebate for cash; the said agreed amount of premium demanded as the consideration of such assurance, on the 15 day of April, A. D. 1882, at the city of New Orleans, the said respondent received and accepted the same, and then and there made, executed, and delivered to libellant in due form its written contract and policy of insurance duly executed by the proper officers of said corporation, and whereby said respondent became and was and is bound and obligated to make good and pay unto libellant all loss and damage which can or could be suffered by this libellant by reason of the loss or injury of said vessel by the perils of the seas or navigation to the full extent of $5,000 as the value of libellant's interest & ownership in said vessel as
6 set forth and contained in said policy and contract of insurance, as by said contract filed with this libel and made a part hereof will more fully and at large appear, and to which said libellant at all times refers.

5. That said insurance, above set forth, was all the insurance of said libellant's interest in said vessel, & that he has no other insurance in said vessel; that by the terms of said contract said interest of libellant was insured from said 15th day of April, 1882, at noon, until the 15th day of April, 1883, at noon.

6. That on or about the 5th day of September, 1882, the said ship Orient, at that time being staunch and in all things seaworthy, well equipped and manned, laden with a cargo — lumber and timber, departed from Ship Island on a voyage to the port of Liverpool, England, and while prosecuting said voyage on the high
7 seas, on the 9th day of September, 1882, encountered and was struck by a severe storm, and that by reason of the violence of said storm said vessel was, on and during said 9th day of September and during the night of said day and the early part of the next day, cast away, foundered, dismantled, and so broken up by the winds, waves, and violence of the sea and storm that she then and there became and was and is a total wreck and in all things as a vessel cast away, wrecked, and totally lost to the owners thereof; that at the time of the said wreck and loss of said vessel, as afore-

said, libellant was the master thereof; that said master and crew were taken off by a passing vessel after the storm had subsided, and but for such timely aid would have also been lost and de-
8 stroyed and have perished; that at the time when said master & crew were so taken off said wreck said vessel was a helpless wreck; all of her masts and rigging had been torn and swept away by the storm, her upper deck and sails gone from the forecastle back to the break of the poop and down to the next deck; that the deck, thus exposed, was also broken up in places, the vessel's cabin swept out, and all of the ship's water and supplies gone overboard, with the ship's charts and instruments, the wheel slowing gear also torn away & overboard, & the vessel full of water, all of which said destruction was caused by the violence of the winds and waves, by the the perils of the seas, & without the fault of the master and owners or the crew of said vessel, and that the said vessel was so wrecked as to be destroyed and worthless for all purposes of commerce and navigation.

9 7. That some days after said vessel was so wrecked, salvers, with a steam tow-boat, found the said wreck and towed the same into the port of New Orleans, where said vessel and so much of the cargo thereof as had not been washed out of said wreck by the seas was libelled and condemned, and sold at the suit of the salvers under the decree of this hon. court; that as soon as said wreck was towed into said port libellant and the other owners thereof surrendered and abandoned their interest therein to the said respondent.

8. That this libellant, as the master of said vessel, and as part owner thereof, made due protest and extension thereof, and notified the same with the loss & wreck of said vessel to the said defendant with promptness and without delay; that the said respondent, on
10 and prior to the 20th day of Sept., 1882, had full notice of the loss of said vessel, & of its liability under the terms of said policy.

9. That libellant, more than 60 days prior to the date of exhibiting this libel, made due demand of said respondent that it carry out and fulfil its obligation contained in said contract and policy of insurance and pay to this libellant the said sum of $5,000 named, and which said respondent had obligated itself to pay to libellant, and which had thus become demandable by libellant by reason of the premises; that although said libellant had in all things paid said premium, and had in all things complied with the terms of said contract on his part, yet the said defendant has in all things wholly failed and neglected to fulfil and carry out its said obligation as contained in said contract and policy of insurance, and still refuses to
11 comply with the same and pay said sum of $5,000, or any part thereof, although the same has long since been justly due and owing from said respondent to libellant, and has been by him often demanded.

10. That all and singular the premises are true and within the admiralty cognizance of this hon. court, all of which said matters of demand libellant will aver, prove, and maintain as the hon. court shall direct.

Wherefore, the premises considered, libellant prays that this honorable court will take cognizance of the matters herein set forth, and will allow unto libellant due process in due form of law, as accustomed in courts of admiralty in like causes, directed to the said respondent, the said Merchants' Mutual Insurance Company
12 of New Orleans, commanding the said respondent, within a time certain to be named in said process, to be and appear in this hon. court, & then and there full, true, and complete answer make to the premises; and that after due proceedings had in this hon. court *that* said respondent be adjudged and condemned to pay the libellant the sum of five thousand dollars, as contained in said contract and policy of insurance, with interest thereon, at such rate as the court shall decree for and during the time which said respondent has so wrongfully withheld the payment thereof and until the same shall be paid to libellant, and that the court further condemn the said respondent to pay all the costs of this action, and that the court further grant unto said libellant such other and further relief in the premises as the nature of this
13 case may require or as to this hon. court shall seem meet and just in the premises, and will ever pray.

GEO. D. ALLEN.

J. R. BECKWITH,
Proctor for Libellant.

Sworn to and subscribed before me this 13 Jan'y, '83.

J. DEVENSHIRE,
U. S. Com'r.

14 The President of the United States of America to the marshal of the eastern district of Louisiana, Greeting:

You are hereby commanded to summon the Merchants' Mutual Insurance Co., of New Orleans, through its proper officers to comply with the demand of George D. Allen contained in the libel, of which a copy accompanies this citation, or to deliver his answer in the office of the clerk of the district court of the United States of America for the eastern district of Louisiana, holding sessions in the city of New Orleans, in ten days after the service hereof, a judgment will be rendered against him by default, which delay is increased one day for every ten miles the defendant's residence is distant from New Orleans, the place where the court is held; and that you make due re-
15 turn hereof on the 1st Monday of February, 1873.

Witness the honorable Edward C. Billings, judge of said court, at the city of New Orleans, this 13th day of Jan'y, A. D. one thousand eight hundred and eighty-three.

[SEAL.] J. DEVONSHIRE, *Clerk.*

United States District Court of New Orleans.

Marshal's Return.

Received this 15th day of January, 1883, and the 16th day of Jan'y, 1883, served copies of the within citation and copy of libel

annexed on the within-named Merchants' Mutual Ins. Company of New Orleans, def't, in the manner following, to wit, by handing the same to Paul Fourchy, Esq., in person, in the city of New Orleans, the president of the aforesaid company.

E. S. CURRY,
D. U. S. Marshal.

16 *Exceptions. Filed January* 26, 1883.

GEO. D. ALLEN)
vs.) 11894.
MERCHANTS' MUTUAL INS. CO.)

To the Hon. Edward C. Billings, judge of the district court of the U. S. for the east. district of La.:

The exceptions of the Merchants' Mutual Insurance Company of New Orleans, defendants to the libel of George D. Allen, libellant, filed in the above cause, allege:

1st exception. That the same does not state the occupation and place of residence of the libellant.

2 exception. That the same does not state positively on what day of September said ship Orient departed from Ship Island, nor does said libel state where said Ship Island is situated, nor to what
17 distance from said Ship Island the said ship had proceeded on her voyage towards Liverpool when she encountered a storm, nor on what waters or in what longitude and latitude the said ship Orient was at the time of her alleged wreck.

In all which particulars the said libel is imperfect and insufficient, and therefore the said respondents are not bound to answer the same, and therefore they pray that the said libellant may be ordered to amend his said libel by making further and sufficient allegations in regard to the particulars herein excepted to.

T. H. KENNEDY,
Proctor for Respondent.
P. FOURCHY

Sworn to and subscribed before me this 26 January, 1883.
K. LOEW, *U. S. Com'r.*

18 *Amended Libel. Filed January* 29, 1883.

GEO. D. ALLEN)
vs.) 11894.
MERCHANTS' MUTUAL INS. CO.)

And now comes the said libellant, Geo. D. A. Allen, and protesting that the libel herein is in all things sufficient, and that said supposed exceptions and objections thereto made by respondents herein in the paper filed in this cause on the 26th instant by respondent, termed and called "exceptions," is in all things frivolous, badly pleaded, and a most transparent desire to secure delay and procrastination and to obstruct the course of proceedings herein, without regard to right or the due and regular course of proceedings in

causes in admiralty, yet in order that such intention may be defeated, and to that end alone, doth consent to amend said libel in
19 compliance with the frivolous objections of said respondent, and to that end and for that purpose doth by leave of the court add to the said libel the following allegations of detail and propound as follows:

1. The libellant, Geo. D. Allen, is by occupation and profession a mariner, and late was master of the said ship Orient, and resides at Marion, in the State of Massachusetts, but is now present in the eastern district of Louisiana temporarily on business.

2. That Ship Islands is a part of the territory jurisdiction within the limits of the United States of America, of which this court takes judicial notice, and is also a part and parcel of the territory of the State of Mississippi, one of the States of the Federal Union of the United States of America, and is off the southern coast
20 of said State, and was at one time a base of military operations against the city of New Orleans during the late rebellion, and as such acquired some notoriety.

3. That said ship Orient sailed from said Ship Island on said voyage, on which she was lost and wrecked, on or about the 5th day of September, in the year of our Lord 1882.

4. That said vessel had progressed on her said voyage towards Liverpool, England, about 110 miles, in the most direct route possible, and when she encountered the storm by which she was destroyed, was, as near as her position could be ascertained by reason of bad weather and loss of ship's charts and instruments in the wreck of said vessel, in longitude 88° 35 west, & latitude 28° 30 north. By reason of the bad weather no observation could be made for 24 hours prior to the loss and destruction of said vessel.

That, said locality is in the water commonly known as the
21 Gulf of Mexico.

5. That all and singular the premises are true.

Wherefore said libellant, in all things repeating and affirming all of the allegations in said libel and amended libel set forth, prays as in his said libel he had heretofore prayed, and for all such other and further redress and relief in the premises as the nature of his case may require and as to the court shall deem meet and just; that he be allowed to file this as amendment to said libel, and that the court adjudge and decree against the said respondent, The Merchants' Mutual Insurance Company of New Orleans, the full payment of the said sum demanded in said libel, and for general relief.

J. R. BECKWITH,
Proctor for Libellant.

22 GEO. D. ALLEN.

Sworn to and subscribed before me this 29 Jan'y, 1883.

K. LOEW, *U. S. C.*

Let this amended libel be filed.
January 29, 1883.

EDWARD C. BILLINGS, *Judge.*

Order on Respondent to Answer Within 2 Days.

JANUARY 29, 1883.

On motion of J. R. Beckwith, proctor for libellant, it is ordered that the libellant have leave to file amendment to the libel, and that the respondents answer said libel within 2 days from this date.

Answer. Filed January 31, 1883.

GEO. D. ALLEN
vs. } 11894.
MERCHANTS' MUT. INS. CO. OF N. O.

To the Hon. E. C. Billings, of said district court:

And now unto this hon'ble court come the Merchants' Mutual Insurance Company of New Orleans, and for answer to the libel and amended libel filed against them herein by George D. Allen, the libellant, allege and propound as follows:

1. That as to the 1st article of said libel they are uninformed and neither admit nor deny the allegations thereof, but leave the same to be proved.

2. That as to the 2nd article of said libel they admit that the said ship Orient was on the high seas on 15 April, 1882, but deny that she was in all things seaworthy; they admit that on that day (15 April, 1882) application was made to respondent by said libellant, agent, for insurance on his alleged interest and share in said vessel, against certain perils, to the extent of $5,000, valuing the whole ship at $25,000, and that respondent accepted said application for insurance for and in consideration of a premium of $500; they aver that the perils against which insurance was so applied for are set out in full in the policy filed by libellant with his said libel along with the other matters embraced by the contract between the libellant and them; and they deny any and all allegations in said 3d article of said libel which may differ from the terms and stipulations and conditions of said policy.

4. That as to the 4th article of said libel they admit that after the acceptance of libellant's application for insurance, as admitted in the 3d article of this answer, libellant paid the premium agreed on, and on the same day, viz., 15 April, 1882, received from respondents their written contract or policy of insurance, being the same policy filed by libellant with his libel as part thereof, in which all the obligations and rights of respondents, as insurers in the premises, are set forth fully and clearly; they deny any and all averments of said libel which are not admitted by this 4th article of their answer.

5. That as to the 5th article of said libel they are uninformed as to any other insurance by libellant, and neither admit nor deny the same, except that they admit that the period specified for the continuance of the policy was from 15 April, 1882, to 15 April, 1883, as stated in said policy.

6. That as to the 6th article of said libel they admit that said

libel; they deny her loss & wreck, except so far as is admitted in the articles 6, 7, & 8 of their answer to said original libel.

4. They admit that when said vessel, the Orient, had reached a point in her said voyage 110 miles from said Ship Island, in a direct line, and when she encountered the alleged storm, she was in longitude 88° 35′ west and latitude 28° 30′ north, approximately, in the Gulf of Mexico. As to the other allegations of said 4 article of the said amended libel they are uninformed, and neither admit nor deny the same, but leave them to be proved.

34 5. They admit that all and singular the allegations of said amended libel are true so far as admitted in the above answers thereto; so far as they have not been admitted, they are neither admitted nor denied, because of respondents' insufficient information in regard to them, with this modification, that respondents confirm the 2d article of this answer to said amended libel.

Wherefore respondents pray that this honorable court will be pleased to pronounce against the libel and amended libel herein, and that the same may be dismissed, with costs to these respondents, and for general relief.

P. FOURCHY.

T. H. KENNEDY,
Proctor for Respondents.

Paul Fourchy, president of the Merchants' Mutual Insurance Co. of New Orleans, being sworn, says that the allegations of the foregoing answer to the libel and amended libel herein, so far
35 as made on knowledge, are true, and so far as made on information and belief, he believes to be true.

P. FOURCHY.

Sworn to and subscribed before me this 31 January, 1883.

K. LOEW,
U. S. Com'n'r.

Amended Answer. Filed February 12, 1883.

And now into this hon. court come the respondents, and, with leave of the court first obtained, for further answer to the libel herein, allege and propound as follows:

1. That they are informed and believe, and therefore charge, that said ship Orient was further unseaworthy in this, that her mizzenmast was dry rotted and insufficient at and before the execution of the policy in which they are sought to be made liable herein.

36 2d. That before said ship had received any portion of her cargo she was leaking to such an extent as to render her unfit to receive the same or to proceed to sea, as she did, with safety to herself, her crew, and her cargo, and that this was known to her master, the said G. D. Allen.

3. That all and singular the premises are true.

Wherefore respondents pray that this amended answer be filed, and that this hon. court be pleased to pronounce against said origi-

nal and said amended libel, and to reject the demands of said libellant and to condemn him in both, and they pray for general relief.

P. FOURCHY.

T. H. KENNEDY,
Proctor for Resp'ts.

Sworn to and subscribed before me this 12 February, 1883.

K. LOEW; *U. S. C.*

37 Let this amended answer be filed.
February 12, 1883.

EDWARD C. BILLINGS, *Judge.*

Amended Answer with Interrogatories. Filed Feb'y, 1883.

GEORGE D. ALLEN
vs. } 11894.
MERCHANTS' MUTUAL INS. CO. OF NEW ORLEANS.

The respondents, for further answer the libel and amended libel filed against them herein, allege that they are informed and believe, and therefore charge and propound as follows, viz:

1. That the last port in or at which said ship Orient was before the date of the policy in which respondents are sued is the port of Liverpool, England.

2. That at the time of said ship's departure from Liverpool,
38 and for a long time previous thereto, the mizzenmast of said ship was unsound and rotten, and was so down to the date of her alleged wreck.

3. That all and singular the premises are true.

Respondents aver that they desire the personal answers on oath of libellant to the interrogatories herein below.

Wherefore respondents pray leave to file this further amended answer and the following interrogatories, and that libellant be ordered to answer the said interrogatories on oath within a delay to be fixed by the court.

THOS. H. KENNEDY,
Proctor for Respondents.
P. FOURCHY.

1 Interrg. Was not Liverpool the last port in or at which said ship Orient was immediately prior to the date and execution of the
39 policy on which libellant is claiming herein?

2d Interrg. How long had she been in that port?

Sworn to and subscribed before me this 22 Feb'y, 1883, by P. Fourchy.

K. LOEW, *U. S. C.*

Let this amended answer be filed and let the interrogatories be answered by libellant on oath within three days from service hereof.
Feb'y 23, 1883.

E. C. BILLINGS, *Judge.*

Answer to Interrogatories. Filed Feb'y 24, 1883.

GEORGE D. ALLEN
vs. } 11894.
MERCHANTS' MUT. INS. CO. OF NEW ORLEANS.

40 To the hon the judge of the dist. court east. district of Louisiana·

And now comes Geo. D. Allen, the libellant in this cause, and in answer to the interrogatories propounded by the defendant in this cause, pursuant to the order of the court, to be answered by him, saith, in answer to the 1st interrogatory, yes.

In answer to the 2d interrogatory: About 30 days, according to the best of my recollection and belief.

GEO. D. ALLEN.

Subscribed and sworn to before me this 24 February, 1883.
K. LOEW, *U.S. C.*

41 *Hearing and Continuance.*

MARCH 2D, 1883.

GEO. D. ALLEN
vs. } 11894.
MERCHANTS' MUTUAL INS. COMPANY.

The above cause was this day regularly called for trial.

Present: J. R. Beckwith, for libellant; Thos. H. Kennedy, for respondent.

The trial thereupon proceeded, and after hearing the pleadings, evidence, and argument, and the hearing not being concluded, the same was continued to March 8th, 1883, at 11 a. m., the evidence offered by the parties being as follows:

For Libellant.

The policy sued on in this case—
Depositions of G. D. Allen.
" G. Barstow.
" C. A. Greene.
" Capt. R. J. Lawson.
42 " Jno. Sutherland.
" Jno. Nelson.
" Jas. Burris.
" Jas. McFalls.
And bill and pleadings in No. 10043, U. S. circuit court. Protests' A & B.
Dep. G. Moses & photographs A, B, C.
Dep. of T. J. Woodward.
" " Geo. Weiden.
" " Ed. Moore.
" " Frank Kemble.
" " A. K. Miller.

" " Geo. Frantz.
Dep. of Jno. H. Tenley.
" " Rol. B. Quirk.
" " H'y Langdon.
" " Mayer Herman.
And in connection with his testimony weather reports from Signal Office at Washington.
Dep. A. B. Heyman, D. C., for September, 1882.
" L. E. Ferguson.
" Rich. Frances.
Copy of bill of sale, certified copies in the record of custom-house.
Certificate of entry & master's oath to show time of depart-
43 ure of vessels from Liverpool and arrival at New Orleans.
Also Craig & *al. vs.* Ship Orient & cargo, No. 11868, U. S. dist. court.

Pleadings & Decree for Respondent.

Depositions of W. L. Cozzens, O. F. Vallette, H'y Blair, Jas. Otteson, A. Firmez, do., recalled; O. F. Vallette, recalled; and diagram of mast; John Guillotte, Ed. Joy, J. H. Lynch, W. M. Baker, do., recalled; M. W. Francis, exhibit marked Burris, diver; Geo. D. Allin, document marked survey; Thos. J. Woodward, libellant's answers to interrogatories; also respondent's testimony taken in No. 10043, circuit court; H'y Nesbit, H. J. Leverence, Jno. Franz, Jno. Murphy, E. A. Lamooth, Robert E. Dadey, Jno. Burris, H'y Graham, Geo. Krasmunski, Chas. Peterson, J. C. Johnson, J. A. Moale, Alex. Lacoins, Jno. Franz, recalled.

44 *Submission. March 8, 1883.*

GEO. D. ALLEN
vs. } 11894.
MERCHANTS' MUT. INS. COMPANY.

The trial of this cause was this day resumed and after hearing further argument the court took time to consider, and a reasonable delay was allowed the proctors to submit briefs.

Judgment. March 26th, 1883.

GEO. D. ALLEN
vs. } 11894.
MERCHANTS' MUT. INS. CO.

This cause came on to be heard and was argued by counsel and thereupon, upon consideration thereof, the court finds the is-
45 sues for the libellant. It is therefore ordered, adjudged, and decreed that George D Allen do have and recover from the respondent, the Merchants' Mutual Insurance Company of New Orleans, a corporation organized under the laws of the State of Louisiana, the sum of five thousand dollars with 5 % interest from 1 December, 1882, till paid and costs of suit.

Judgment rendered March 26, 1883.
Judgment signed April 2, 1883.

EDWARD C. BILLINGS, *Judge.*

Appeal. Granted April 2, 1883.

GEO. D. ALLEN
vs.
MERCHANTS' MUT. INS. CO. } 11894.

On motion of T. H. Kennedy, proctor of respondent suggesting to the court that they feel aggrieved by the final decree rendered herein against them on the 26th of the last month, March, 1883,
46 and desire to appeal therefrom:

It is ordered that an appeal operating as a supersedeas be allowed them from said final decree, returnable to the circuit court of the U. S. for the 5th circuit & eastern district of Louisiana next to be holden in said district, on giving bond and security in the sum of $8,000, according to law.

Consent to Use Insurance Policy in the Original.

GEO. D. ALLEN
vs.
MERCHANTS' MUTUAL INSURANCE CO. } 11894.

It is agreed that the policy sued on in above case may be annexed to the transcript in original.

T. H. KENNEDY,
Proctor for Respondent.
J. R. BECKWITH,
For G. D. Allen.

47 *Bond for Appeal.*

UNITED STATES OF AMERICA, *Eastern District of Louisiana:*

District Court of the United States. In Admiralty.

GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INS. CO. } 11894.

Appeal bond.

Know all men by these presents, that we, The Merchants' Mutual Insurance Company of New Orleans, as principal, and M. W. Smith, as surety, are held and firmly bound unto said George D. Allen, libellant, in the sum of eight thousand dollars, to be paid to the said George D. Allen, libellant; for the payment of which, well and truly to be made in lawful money of the United States, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents.
48 Sealed with our seal- and dated at New Orleans the 4 day of April, 1883.

Whereas the above-named Merchants' Mutual Insurance Company of New Orleans have appealed to the next term of the circuit court of the United States for the 5th circuit and eastern district of Louisiana from a final judgment of the district court of the United States for said district rendered against them on the 26 day of March, 1883, and signed on the 2d day of April, 1883, in the above-entitled cause:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute their appeal to affect and answer all damages and costs and satisfy whatever judgment may be rendered against them if they fail to make their appeal good, then this obligation to be void; otherwise the same shall be and remain in full force and effect.

49 MERCHANTS' MUTUAL INS. COMPANY,
OF NEW ORLEANS,
By P. FOURCHY.
M. W. SMITH.

Signed, sealed, and delivered in the presence of—

Bond approved April 5, 1883.
(Signed) EDW. C. BILLINGS, *Judge*.

M. W. Smith, surety on the within appeal bond, being duly sworn, says that he resides in this city, and is worth the sum of $8,000 over and above his just debts and liabilities.

M. W. SMITH.

Sworn to and subscribed before me this 4 day of April, 1883.
K. LOEW,
U. S. Com'r.

50 District Court of the U. S. for the Eastern District of Louisiana.

CLERK'S OFFICE.

I do hereby certify that, by reason of the great size of the record, the transcript of appeal has been divided into two parts, and that the foregoing 220 pages, forming part 1st, together with the 553 pages constituting part 2d, do contain and form a correct and complete transcript of all the originals on file and of record in the matter of Geo. D. Allen *vs.* The Merchants' Mutual Insurance Company, No. 11894 on the docket of said court, with the exception of the policy sued on, the 3 photographs A, B, & C, the diagram showing the interior of ship Orient, D, and the monthly weather review, marked E, all of which documents or exhibits are sent up with the transcript in original.

Under the agreement of the 24 March the record No. 10043
51 of the docket of the circuit court will be used in original on the trial of the appeal, and copy of same is dispensed with.

The policy is, at request of counsel, lodged in my safe, and will be produced when called for.

In faith whereof I hereto set my hand and the seal of our said court, at the city of New Orleans, this 14 April, 1883.

K. LOEW,
Dy Clerk.

52 *Proceedings in the Circuit Court.*

Hearing and continuance.

Extract from Minutes. April Term, 1883.

NEW ORLEANS, *Monday, April 30th*, 1883.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

GEORGE D. ALLEN
vs.
MERCHANTS' MUT. INS. CO. } No. 10224.

This cause came on to be heard on the transcript of the record from the district court of the United States for this district, and evidence brought up from said district court, and having been partially heard the same was continued till to-morrow at 11 o'cock a. m.

53 *Hearing and Submission.*

Extract from the Minutes. April Term, 1883.

NEW ORLEANS, *Tuesday, May 1st*, 1883.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INS. CO. } No. 10224.

This cause came on to be heard further to-day and was argued by the counsel for the respective parties herein and submitted. And the court took time to consider.

Findings and Decree.

Extract from Judgment Book. April Term, 1883.

NEW ORLEANS, *Monday, June 4th*, 1883.

Court met pursuant to adjournment.
Present: Hon. Don A. Pardee, circuit judge.

GEORGE D. ALLEN
vs.
MERCHANTS' MUTUAL INS. CO. } No. 10224.

54 This cause came on to be heard on the transcript of appeal and evidence and was argued.

Whereupon the court doth find the following as the facts of the case:

First. That on and prior to the 15th day of April, A. D. 1882, the libellant was the owner of one-fourth (¼) interest, and ownership in the ship "Orient," of about eighteen hundred tons burthen. That said vessel was ship rigged and of the value of $25,000.

Second. That the defendant, the Merchants' Mutual Insurance Company of New Orleans, on the 15th day of April, A. D. 1882, made, executed, and delivered to the said libellant the policy of insurance annexed to the libel in this cause, and was paid and received the stipulated premium therefor.

Third. That the said defendant insured the said interest of
55 the said libelant for the sum and to the extent of $5,000.00, and that the libelant had an assurable interest in said vessel exceeding the sum of $5,000. That the said policy of insurance was a time policy for the period of one year, commencing to run on the said 15th day of April, A. D. 1882, at 12 o'clock meridian of that date, and continued to and covered the period of one year, ending on the 15th day of April, A. D. 1883, at 12 o'clock meridian of that date.

Fourth. That when said risk was taken by the said defendant and said policy executed and delivered the said ship "Orient" was on the Atlantic ocean, bound on a voyage from the port of Liverpool, England to the port of New Orleans, in the United States, laden with a general cargo. That the defendant at the time of the execution and delivery of the policy of insurance was well aware of that fact and had notice and knowledge that the vessel was prosecuting said voyage, bound to the port of New Orleans, and insured the vessel lost or not lost.

Fifth. That the port of New Orleans was the home port of
56 the said Orient and was the domicil of the underwriting company, and that all parties knew that the ship was sailing to and from that port, and when the policy sued on was issued it was the intention of the assured and underwriters that the said policy was to cover risks while said ship was navigating the Gulf of Mexico, except excluded ports.

Sixth. That at the time the said ship Orient sailed from the port Liverpool on the voyage mentioned in the 4th preceding finding the said vessel was seaworthy, properly equipped and manned, and made the voyage in safety and delivered her cargo in good order and condition in the port of New Orleans, and that the said policy of insurance attached to said vessel.

Seventh. That after said vessel had unladen her cargo in the port of New Orleans she proceeded to Ship Island, off the coast of the State of Mississippi, to load with a cargo of timber for the port of Liverpool, England, and was laden with a proper cargo of timber properly stowed and secured under deck.

57 Eighth. That on the 5th day of September, A. D. 1882, the said vessel sailed from Ship Island laden with said cargo and proceeded on her voyage by the most direct available route permitted by the prevailing wind until wrecked.

Ninth. That when the said ship "Orient," on the 5th day of Sep-

tember, A. D. 1882, sailed from Ship Island on said voyage, the vessel was seaworthy, staunch, strong, and duly manned and equipped.

Tenth. That said vessel proceeded on her voyage in safety until about three o'clock in the morning of the 9th day of September, 1882, when said vessel encountered a severe cyclone, the said vessel at time having proceeded about one hundred and ten miles on her voyage, and being in longitude 88 35 west, latitude 28 30 south.

Eleventh. That said vessel encountered said cyclone at about the hour of three o'clock a. m. of the 9th day of September, 1882, and was at that time properly and skilfully managed and navigated.

Twelfth. That the ship's canvass had at that time been
58 taken in and the vessel was under only such canvas as was proper or could be carried in a severe storm, and barely sufficient to render the vestel manageable and hold her on her course.

Thirteenth. That between the hours of three o'clock a. m. and six o'clock a. m. of the 9th day of September, 1882, without any fault or mismanagement upon the part of the master or crew of the said vessel, but by reason of the severity of the cyclone and gale, the said vessel was thrown upon her starboard beam ends, and refused to right or come back on an even keel.

Fourteenth. In an endeavor to right the said ship the weather lanyards of the mizzen rigging were cut away by the orders of the master, and the ship's mizzenmast sent overboard; that when relieved of her mizzenmast the vessel still refused to right up, whereupon the weather lanyards of the mainmast were cut and the mainmast sent overboard; that at this time the sea was breaking over the port bow of said vessel with such violence the crew were unable to reach the rigging of the foremost to cut away and relieve the ship of her fore-
59 mast, but within a few moments the ship commenced breaking up forward, and the foremast was swept out of the ship, carrying away the upper deck from abre-st of the foremast to the break of the poop, tearing away the top sides and timbers of the the vessel down even with her second deck, tearing up the second deck in many places, carrying away the vessel's cargo stored in the upper atween decks, all stores, provisions, instruments, and charts belonging to the vessel, and leaving her a complete wreck; the sea, breaking over the wreck, entered the ship through the holes in the deck, and she became filled and water-logged, the officers and crew of the said vessel at this time being obliged to lash themselves to the rail on top of the cabin to prevent being washed overboard by the seas making a break over the vessel.

Fifteenth. That the said wreck drifted, at the mercy of the wind and currents, for a period of thirty-six hours, the officers and crew being without water and provisions during that time, being finally rescued and taken off the wreck by a passing steamship, and the wreck — abandoned.

60 Sixteenth. That said master and crew of the said vessel were brought by said steamship to the port of New Orleans, and the said defendants notified of the loss and wreck of said vessel.

Seventeenth. That said wreck, abandoned as aforesaid, drifted about in the ocean until the 16th day of September, 1882, when said

wreck was picked up by salvors and towed into the port of New Orleans, libeled in the district court of the United States for the eastern district of Louisiana for salvage, and condemned and sold under the decree of said court to satisfy the salvors' claim for salvage.

Eighteenth. That as soon as said vessel was towed into the port the master and owners of said vessel abandoned the same and all their interest therein to the said defendant, the said defendant refusing to accept such abandonment.

Nineteenth. That said vessel was destroyed and wrecked by the force and violence of said cyclone and the perils of the sea, and from no other cause, nor by reason of any defect in said vessel or in her navigation, and was lost and by a peril of the sea
61 insured against in said policy.

Twentieth. That the said libelant made and produced to the said defendant due and proper proof of loss, and made due and proper demand for the payment of the amount due under the policy more than sixty days after the proofs of loss had been furnished, and that payment thereof was refused by the respondent; that said vessel was a total wreck, and was wrecked and destroyed within and during the period covered by the policy.

Twenty-first. That at the time said ship "Orient" was wrecked and destroyed she was under the protection of said policy of insurance, and was lost and wrecked by a peril of the sea insured against.

And thereupon the court doth find the following as conclusions of law:

First. That the said policy attached and became and was a valid, binding contract between the parties.

Second. That the wreck and loss of the said Orient was by causes covered by the policy, and thereupon the respondent became liable for the full amount of the insurance.

62 Third. That the libelant is entitled to a decree for the full amount of his policy, with interest from January 13th, 1883, at five per cent. per annum, and for all costs.

It is therefore ordered, adjudged, and decreed that the libelant, George D. Allen, do have and recover of and from the respondent, the Merchants' Mutual Insurance Company of New Orleans, a corporation organized under the laws of the State of Louisiana, the sum of five thousand dollars, with five per cent. per annum interest from 13th January, 1883, until paid, and costs of suit, both in the district court and in this court.

Decree rendered June 4th, 1883.

Decree signed June 8th, 1883.

DON A. PARDEE, *Judge*.

Bill of Exceptions No. One. Filed June 7th, 1883.

United States Circuit Court, Eastern Dist. of Louisiana. In Admiralty.

GEO. D. ALLEN
vs. } 10224.
MERCHANTS' MUT. INS. CO.

Be it remembered that after the trial of this case and before its decision proctors for the def't, asked the court to find,
63 among other things, "That the ship Orient was in the Atlantic Ocean, and on a voyage from Liverpool, at the time of the issuance of the policies of insurance; and there is nothing in the record to show that defendant had any knowledge or information of her destination." And that "the ship Orient, prior to her departure on her last voyage, on 1st August, 1882, was run aground on Ship Island bar, where she remained for three days and two nights in bad and squally weather, 'rolling and pounding heavily,' and while on the bar, and after coming off, drew and continued to draw four inches of water per hour until the final wreck, and that when she was thrown upon her beam ends by the force of the storm she was prevented from righting herself by the large amount of water which had leaked into her hold, and hence the cutting away of her masts was of no avail, and the said leak was the direct cause of her loss, and she was unseaworthy when she started on her last voyage;" and "that when the ship Orient was hauled off the bar at Ship Island,
64 where she had been aground as aforesaid, she leaked four inches of water per hour; and said leak did not diminish from said time, 3rd August, 1882, until 5th September, 1882, when she went to sea on her last voyage, nor until she was finally wrecked, and said leak could have been discovered only by unloading said vessel and taking her to New Orleans and putting her in the dry dock, which was not done, and no other precaution was taken to ascertain whether said vessel was injured by having been aground, or to ascertain the leak or leaks, save by a cursory examination of her bottom by a diver, without taking her out of the water;" and "that the ship Orient was knowingly sent to sea by the assured in an unseaworthy state and in an unfit condition, which necessarily increased the danger which led to her loss;" and said proctors represented to the court that they considered these facts material to the determination of the cause, and that such facts were conclusively proved by all the evidence in the cause, which said evidence is hereto attached and made part of this bill of exceptions; but the court refused to find said facts as so requested, and found facts
65 directly contrary to the facts so requested to be found; whereupon, at the time of such finding, the proctors for def't excepted to the refusal of the court to find as requested by them as above set forth, and excepted to all those findings of the court that are in conflict with such requests as being unsupported by the evidence, and tendered this their bill of exceptions, which they pray

the court to sign and make it a part of the record; which is accordingly done.

By the court:

This bill is claimed by the respondent under the authority of "The Francis Wright," 105th U. S., page 381, considering which case the court does not feel at liberty to deny the bill. As the entire evidence is to be attached to and go up with the bill it is not deemed necessary to put in the bill the particular evidence or reasoning upon the same which induced the court to find the facts in the case as determined in the general facts as found or in refusing to find as requested.

DON A. PARDEE, *Judge*.

66 *Bill of Exceptions No. Two. Filed June 7th*, 1883.

U. S. Circuit Court Eastern Dist. of Louisiana. In Admiralty.

GEO. D. ALLEN
vs. } 10224.
MERCHANTS' MUT. INS. CO.

Be it remembered that at the time of the decision of this cause in this court, on 4 June, 1883, the court, among other findings of fact, made the following:

"Fourth. That when said risk was taken by the said defendant and said policy executed and delivered the said ship Orient was on the Atlantic Ocean bound on a voyage from the port of Liverpool to the port of New Orleans, in the United States, laden with a general cargo; that the defendants at the time of the execution and delivery of the policy of insurance was well aware of that fact, and had notice and knowledge that the said vessel was prosecuting said voyage, bound to the port of New Orleans, and insured the vessel, lost or not lost.

"Fifth. That the port of New Orleans was the home port of the said Orient and was the domicil of the underwriting company,
67 and that all parties knew that the ship was sailing to and from that port, and when the policy sued on was issued it was the intention of the assured and the underwriters that the said policy was to cover risks while said ship was navigating the Gulf of Mexico, except excluded ports.

Twenty-first. That at the time said ship Orient was wrecked and destroyed she was under the protection of said policy of insurance, and was lost and wrecked by a peril of the sea insured against;" which findings were material to the determination of the cause, and to which said findings these proctors for defendant excepted, on the ground that there was no evidence in the record to authorize or support such findings, a copy of all the evidence and testimony taken in the case being annexed hereto as part of this bill of exceptions, and they tendered this bill of exceptions, and prayed that the same be signed and made a part of the record; which is accordingly done.

By the court:

Considering the opinion of the honorable supreme court in
68 the "Francis Wright," 105th U. S., p. 381, I do not feel at liberty to deny this bill.

(Signed) DON A. PARDEE, *Judge.*

Motion and Order for Appeal. Entered and Filed June 7th, 1883.

U. S. Circuit Court.

GEO. D. ALLEN *vs.* MERCHANTS' MUT. INS. CO.

On motion of Joseph P. Hornor and F. W. Baker and Thos. H. Kennedy, proctors for defendant, and on showing to the court that def't is informed and believes that there is error to its prejudice in the final judgment herein rendered against it and in favor of the libelant, Geo. D. Allen, and that it desires to appeal therefrom to the Supreme Court of the United States, and desires that said appeal shall operate as a supercedeas:

It is ordered by the court that the defendant be allowed an appeal herein from said judgment rendered 4 June, 1883, with supercedeas, to the Supreme Court of the United States, and that said ap-
69 peal be returnable to said Supreme Court at the next term thereof, to be held in Washington city on the second Monday of October next, 1883, upon appel-ant giving bond, with good and solvent surety, in the sum of eight thousand dollars, to operate as a supercedeas to said decree.

And it is further ordered that the policy of insurance sued on in this case shall go up to said Supreme Court in original with the transcript of the proceedings, for the consideration of said Supreme Court.

Bond for Appeal. Filed June 8th 1883.

UNITED STATES OF AMERICA:

Know all men by these presents that we, the Merchants' Mutual Insurance Company of New Orleans, and John B. Lallande, are held and firmly bound, jointly and severally, unto Geo. D. Allen, in the sum of eight thousand dollars, lawful money of the United States of America, to be paid to the said Geo. D. Allen, his heirs, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, and each of us by himself, and each of our heirs, executors, and administrators, firmly
70 by these presents. Sealed with our seals and dated the 8th day of June, in the year of our Lord eighteen hundred and eighty-three.

Whereas the said Merchants' Mutual Insurance Company, having heretofore, to wit, on the seventh day of June, 1883, taken an appeal to the Supreme Court of the United States, from and to reverse the decree rendered on the 4th day of June, 1883, by the circuit court of the United States for the fifth circuit, holding sessions in and for the eastern district of Louisiana, in the suit of George D. Allen *vs.* Merchants' Mutual Insurance Company, No. ——, of the docket thereof:

Now, the condition of the above obligation is that if the above bounden Merchants' Mutual Insurance Company shall prosecute its said appeal to effect and shall answer all damages and costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MERCHANTS' MUTUAL INSURANCE COMPANY,
Per P. FOURCHY, *President.* [SEAL.]
J. B. LALLANDE. [SEAL.]

71 Signed, sealed, and delivered in the presence of—
G. W. NOTT.

Bond approved June 8th, 1883.
(Signed) DON. A. PARDEE, *Judge.*

UNITED STATES OF AMERICA, } ss:
Eastern District of Louisiana, }

Personally appeared John B. Lallande, who, being duly sworn, deposes and says that he is the surety on the within bond; that he resides in the city of New Orleans, and is worth the full sum of eight thousand dollars over and above all of his debts and liabilities and property exempt from execution.

J. B. LALLANDE.

Subscribed and sworn before me this 8th day of June, 1883.
(Signed) F. A. WOOLFLEY,
Commissioner U. S. Circuit Court, Eastern District of Louisiana.

Agreement as to Transcript of Appeal. Filed July 3rd, 1883.

U. S. Circuit Court.

GEORGE D. ALLEN }
vs. } No. 10224.
MERCHANTS' MUT. INS. CO. }

72 In this case it is agreed that in the transcript of appeal the clerk may omit all the testimony as annexed to and made a part of the bill of exception, the same being already copied in the transcript of appeal of the case of Silas Weeks *vs.* Merchants' Mutual Insurance Company, No. 10225 of the docket of this court, and which shall be used in the Supreme Court of the United States as part of the record in this case.

(Signed) J. R. BECKWITH,
Proctor for Libellant.

73 UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and [Eastern] District of Louisiana.

CLERK'S OFFICE.

I, Francis A. Woolfley, clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, do

hereby certify that the foregoing 72 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case, of George D. Allen *vs.* Merchants' Mutual Insurance Company, except the policy of insurance sued on, which is sent upon in original with the said transcript No. 10224 of the docket of the said court.

Witness my hand and the seal of said court, at the city of New Orleans, this 24th day of September, A. D. 1883.

Nine (9) words erased, two (2) words interlined. Approved.

[Seal U. S. Circuit Court for the 5th Circuit & Eastern District of La.]

F. A. WOOLFLEY, *Clerk.*

[NOTE.—Words interlined are in brackets.]

I, Don A. Pardee, United States [circuit] judge for the [eastern] district of Louisiana, do certify that Francis A. Woolfley, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and [eastern] district of Louisiana, was, at the time of signing said certificate, and, is now, the clerk of said court; that said certificate is in due form of law and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 24th day of September, A. D. 1883.

Three (3) words interlined. Approved.

DON A. PARDEE, *Judge.*

[NOTE.—Words interlined are in brackets.]

74 THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to George D. Allen, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to a motion and order for an appeal filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein the Merchants' Mutual Insurance Company is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the said Merchants' Mutual Insurance Company, as in said motion and order for an appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 8th day of June, in the year of our Lord one thousand eight hundred and eighty-three.

DON A. PARDEE, *Judge.*

75 [Endorsed:] R. J. R. Beckwith. United States circuit court, eastern district of Louisiana. No. 10224. George D. Allen, appellee, *vs.* Merchants' Mutual Ins. Co., appellant. Citation to appellee.

Marshal's Return.

Received June 11, 1883, by the U. S. marshal, and on June 11th, 1883, I served a true copy of the within citation of appeal on George D. Allen, appellee herein, by handing the same to J. R. Beckwith, Esq., in person, in the city of New Orleans, the attorney of record for said appellee.

J. R. G. PITKIN,
U. S. Marshal, Eastern Dist. of La.,
By DAN. A. ROSE,
Dy U. S. Marshal.

Personally appeared before me Dan. A. Rose, a lawful deputy of J. R. G. Pitkin, U. S. marshal for the eastern district of Louisiana, and makes oath that he served a true copy of the within citation of appeal on the appellee herein named, as set forth in his official return herein.

DAN. A. ROSE,
Dy U. S. Marshal.

Subscribed and sworn before me June 13, 1883.

F. A. WOOLFLEY,
Commissioner United States Circuit Court,
Eastern District of Louisiana.

Endorsed on cover: E. Louisiana C. C. U. S. No. 322. The Merchants' Mutual Insurance Company, appellant, *vs.* George D. Allen. Filed 2d October, 1883.